Validity of Foreign Divorce—Louisiana

The Attorney General of Louisiana, in Opinion Number 80-1687, dated 24 June 1981, has determined that Louisiana will not recognize a divorce obtained under foreign law by a Louisiana resident serving on military orders in a foreign country. The Attorney General predicates his opinion on the principle that the judicial power to grant divorce is based on domicile and the holding of Louisiana courts that a member of the military service is presumed to retain his Louisiana domicile until he abandons it and establishes it elsewhere. The Attorney General also opined that the State of Louisiana will recognize a marriage validly and properly contracted under foreign law by service personnel serving in a foreign country.

Rental Agreement was not subject to Truth in Lending Act. Clark v. The Rent-It Corporation, CCH ¶ 97,126A (S.D. Ia. 1981).

The Truth in Lending Act is applicable to "credit sales," which are defined as sales in which the seller is a creditor. This includes a lease if the lessee contracts to pay for the use of the property a sum substantially equivalent to the aggregate value of the property leased, and will become or has the option to become the owner of the property. (15 U.S.C. 1602(g)).

The plaintiff's lease agreement for a television set provided that he could become the owner of the set after payment of $17 a week for 78 weeks. Plaintiff alleges this is a disguised credit sale, so the Truth in Lending Act disclosures should have been provided. The Court held that this is not a credit sale because the agreement obligated the lessee to rent the set for one week only. Termination could be made at any time after that. One week's rent is substantially less than the value of the television set.

A Matter of Record

Notes from Government Appellate Division, USALSA

1. Larceny of Services

Article 121, Uniform Code of Military Justice, lists the objects which can be the subject of larceny as "any money, personal property, or article of value of any kind." In *United States v. Abeyta*, ___ M.J. ___, SPCM 15438 (ACMR 2 September 1981), the Army Court of Military Review found that taxi cab services cannot be the subject of a larceny as defined by Article 121, Code. Similarly, case law holds that phone services, use and occupancy of government quarters, and use of a rental car cannot be the subject of larceny. *United States v. Case*, 37 CMR 606 (ABR 1966), *pet. denied*, 37 CMR 470 (CMA 1967); *United States v. Jones*, 23 CMR 818 (AFBR 1956); *United States v. McCracken*, 19 CMR 876 (AFBR 1955). The Court in *Abeyta* declined to follow *United States v. Brazil*, 5 M.J. 509 (ACMR 1979).

The theft of phone services, cab services, or other services can be prosecuted under the Uniform Code of Military Justice in a number of ways. First, as recognized by the Court in *Abeyta*, theft of services may be alleged as an offense sounding in fraud under Article 134, Code. *See also United States v. Herndon*, 15 USCMA 510, 36 CMR 8 (1965). Second, the theft of services can be charged as a crime and offense not capital in violation of Article 134, Code, and 18 U.S.C. § 641, if the services taken are property of the United States. Third, it may be possible to charge the theft of services as a violation of a state statute assimilated through 18 U.S.C. § 13. *See United States v. Wright*, 5 M.J. 106 (CMA 1978), and *United States v. Herndon, supra*, if the issue of preemption is raised.

2. Estelle v. Smith and United States v. Mathews

In *United States v. Mathews*, 6 M.J. 357 (CMA 1979), the Court of Military Appeals, per Judge Fletcher, held that "[s]elf-incrimination

therefore, stops as to the crime charged at the time the plea of guilty is accepted" and Article 31, Code, is not applicable to extenuation and mitigation hearings "except where evidence could be produced that would give rise to a charge being laid to a different crime." *Id.*, at 358. This case has been widely read to allow for an inquiry of the accused in order to fulfill the requirements for the admission of records of nonjudicial punishment.

The Supreme Court in *Estelle v. Smith*, ___ U.S. ___, 101 S.Ct. 1866, 68 L.Ed.2d 359 (1981), held that the Fifth Amendment protections against self-incrimination are as applicable during sentencing in a capital case as they are in the findings or guilt phase. This holding is based, in part, upon the gravity of the decision to be made during the penalty phase of a capital case. While the Supreme Court has applied different rules and standards to capital cases than to noncapital cases, the language in *Estelle v. Smith* may be broad enough to apply to criminal cases generally.

Thus, the continued use of "*Mathews* inquiries" may be unwise, especially since recourse to such an inquiry should be necessary in only a few cases. *See United States v. Taylor*, SPCM 15697, slip op. at 3–4 n. 4 (ACMR 3 September 1981). First, *United States v. Mack*, 9 M.J. 300 (CMA 1980), eliminated the need for a "*Mathews* inquiry" if the record of nonjudicial punishment was properly completed. Second, some omissions from the form may not render the form inadmissible. *See United States v. Haynes*, 10 M.J. 694 (ACMR 1981). Further, if there is no objection to the exhibit, there is no need for the military judge to inquire further since the lack of objection constitutes a waiver under Military Rule of Evidence 103(a). *United States v. Beaudion*, 11 M.J. 838 (ACMR 1981). Thus if the form is not complete (*Mack* does not control), the omission is substantial (see *Haynes*), and the defense objects to the document, the use of a *Mathews* inquiry will probably not cure the defect anyway.

Criminal Law News

Criminal Law Division, OTJAG

"Clear Injustice" under AR 27–10

Recently, relying on paragraph 3–20, AR 27–10, a commander set aside five records of NJP imposed during the years 1969 to 1972 and directed their filing in the Restricted (R) fiche of the individual's OMPF. He set aside the NJP because the punishment imposed would, under today's regulatory provision, be classified as "minor punishment."

This office opined that such removal was not in accordance with regulatory provisions for two reasons. First, paragraph 3–15b, AR 27–10, C20, which allows a commander imposing minor punishment an alternative in deciding the filing of the NJP is applicable only to those punishments imposed after 20 May 1890. Second, the provisions of paragraph 3–20, AR 27–10, allowing for a set aside when the punishment has resulted in a "clear injustice," are also inapplicable to this case. To allow a commander to take this action, based on the circumstances of this case, would be tantamount to allowing him to circumvent the intent of the regulation. It was the opinion of this office that a commander has no authority, under paragraph 3–20, AR 27–10, to set aside an Article 15 on the basis that its proper filing, pursuant to a valid Army Regulation, creates what he perceives to be a "clear injustice." DAJA–CL 1981/8632.

Taxicab Services Cannot be Stolen, U.S. v. Abeyta, SPCM 15438, ___ M.J. ___ (ACMR, 2 Sep 1981)

The US Army Court of Military Review opined, expressly overruling United States v. Brazil, 5 MJ 508 (ACMR 1979), that taxicab services cannot be stolen in violation of Article 121, UCMJ. The court held that the terms "money, personal property, or article of value,"